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No. 87-

In the Supreme Court

OF THE

United States

October Term, 1987

SURVIVAL SYSTEMS DIVISION OF THE WHITTAKER CORPORATION, WHITTAKER CORPORATION, and JOHN AGRELLA,
Petitioners,

v.

MILLIE MAE RODRIGUEZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 24, 1987

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QUESTION PRESENTED

Whether a district court has authority to remand a properly removed case to state court after plaintiff voluntarily dismisses all federal causes of action in response to a motion for summary judgment — a basis for remand not authorized by 28 U.S.C. § 1447(c)?

PARTIES TO THE PROCEEDING

All of the Parties to the proceeding below are listed in the caption.*

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*Pursuant to Rule 28.1 of the Court, Petitioner Whittaker Corporation states that is has no parent company and that it has the following subsidiaries or affiliates that are not wholly-owned: Elsin Corporation; Polychimie, S. A.; Whittaker Bioproducts France SARL; and Yardney-Tungstone Special Batteries Limited.

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No. 87-

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v.

MILLIE MAE RODRIGUEZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Survival Systems Division of the Whittaker Corporation ("Survival Systems"), Whittaker Corporation, and John Agrella, Petitioners, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 27, 1987. In that decision, the Ninth Circuit denied a petition for a writ of mandamus concerning the December 4, 1984, Order of the United States District Court for the Southern District of California remanding this case to state court after dismissing respondent's federal causes of action and ruling

that her remaining cause of action was non-federal in nature.

OPINIONS BELOW

The August 27, 1987 opinion of the Court of Appeals for the Ninth Circuit (1a)[1] is officially reported at 825 F.2d 1416 and unofficially reported at 126 L.R.R.M. 2229. The decision of the district court is not reported and is reprinted in the Appendix at 10a.

JURISDICTION

The Court of Appeals issued its decision on August 27, 1987. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1441 and 28 U.S.C. § 1447. 28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right

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[1]Citations to material printed in the annexed Appendix appear as "__a." Thus, the opinion of the Ninth Circuit begins at page 1a of the appendix.

arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On February 17, 1983, Whittaker Corporation discharged respondent, Millie Mae Rodriguez, as an employee of its Survival Systems Division. On February 17, 1984, respondent filed suit in the Superior Court for the County of San Diego against Whittaker Corporation, Survival Systems, John Agrella (hereinafter, "petition-

ers") and twenty Does. She listed six causes of action: (1) wrongful discharge; (2) breach of contract; (3) breach of implied in fact contract; (4) tortious breach of implied covenant of good faith and fair dealing in the employment contract; (5) intentional infliction of emotional distress; and (6) negligent infliction of emotional distress. The summons and complaint were served on petitioners on or about August 9, 1984.

While an employee of Survival Systems, respondent was represented for collective bargaining purposes by the International Association of Machinists and Aerospace Workers (hereinafter, the "Union"). Her wages, hours, and other terms and conditions of employment were governed by a collective bargaining agreement between the Union and Survival Systems. Respondent resorted to the grievance procedure as a result of her discharge and her grievance was prosecuted by the Union, but after investigation the Union withdrew her grievance. Respondent did not sue the Union for breach of the duty of fair representation. Instead, she instituted the instant suit. Petitioners answered and cross-complained.

The various causes of action in respondent's suit allege violations of her collective bargaining agreement. Since such suits are governed by federal law, petitioners removed respondent's suit to the United States District Court for the Southern District of California on September 6, 1984.

Concurrently with the filing of their petition for removal, petitioners filed a motion for summary judgment with the district court. The primary ground for the motion was that all of respondent's causes of action were preempted by federal labor law. In her opposition, respondent conceded that all but the fifth cause of action were preempted and were barred by the applicable statute of

limitations. She therefore requested that the district court enter an order of dimissal as to those causes of action. She argued, however, that the fifth cause of action for intentional infliction of emotional distress is not preempted by federal labor law. Respondent did not seek remand.

On December 4, 1984, the district court, in accordance with respondent's request, granted petitioners' motion for summary judgment as to all but the fifth cause of action. The district court denied the motion as to that cause of action and remanded the case to the State court "pursuant to this court's sound discretion under 28 U.S.C. § 1447." (10a.)

On January 4, 1985, petitioners filed a petition for writ of mandamus with the court of appeals. By an undated Order filed on April 1, 1985, the court of appeals stated that the petition presented two questions: (1) whether the district court erred by refusing to treat the remanded claims as artfully pleaded § 301 claims; and (2) whether review is available under the collateral order doctrine, thus precluding mandamus review. The court's Order directed respondent to file answers to these questions, permitted petitioners to file a reply, and ordered that the case be referred to a merits panel. (8a-9a.)

By Opinion dated August 27, 1987, the merits panel denied the petition for writ of mandamus (7a). The court first concluded that mandamus is the appropriate means of review (6a). However, the court also concluded that the district court's remand order was correct as a matter of law (6a-7a) because: (1) the allegations of the remaining cause of action, "if proved, could sustain a finding that the conduct was outrageous, and thus the claim was not preempted" (7a); and (2) "once the federal claim upon which removal was based is gone, it is within the

discretion of the district court to remand the state claim to the state court from which it was removed." (7a.) The court, in a footnote, acknowledged that the circuits are not in agreement as to the availability of remand for pendent claims, and that the Supreme Court has granted certiorari on this issue in *Carnegie-Mellon University v. Cohill, cert. granted,* 107 S. Ct. 1283 (1987) (No. 86-1021). (7a, at n.2.) However, the court stated in the same footnote that the district court's remand order was not "clearly erroneous as a matter of law" given current Ninth Circuit authority allowing remand under such circumstances.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's refusal to issue a writ of mandamus (1) permits remand for a reason not authorized by 28 U.S.C. § 1447(c); (2) ignores this Court's Thermtron decision; and (3) conflicts with the decisions of other courts of appeals.

In *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 342 (1976), a decision authored by Justice White, this Court held that: "Section 1446 provides the procedure for removal; and a case removed under that section may be remanded only in accordance with § 1447..." (footnotes omitted). In *Thermtron,* a district court had remanded a properly removed case because it determined that, due to a congested docket, the case could be better handled by the State court whence it had come. 423 U.S. at 339. The Sixth Circuit denied a petition for a writ of mandamus, and this Court granted a petition for a writ of certiorari and reversed the Sixth Circuit. 423 U.S. at 341-42.

The Ninth Circuit decision in the instant case permitted remand for a reason not provided in 28 U.S.C. § 1447(c) and ignores *Thermtron*. The courts of appeals are divided over the interpretation of § 1447(c) and over the applicability of *Thermtron* beyond its specific factual circumstances. There should be a single answer, and only this Court can resolve this conflict.

II.

The decisions of the courts of appeals in conflict with the Ninth Circuit are based upon this Court's Thermtron decision and a refusal to expand 28 U.S.C. § 1447(c).

The Seventh, Fifth, and Tenth Circuits have expressly held that remands are *not* proper if made for reasons other than those permitted in 28 U.S.C. § 1447(c).

In *Cook v. Weber,* 698 F.2d 907, 909 (7th Cir. 1983), the Seventh Circuit held that remand of state law claims is not permitted, even though the federal claim was dismissed involuntarily. In reaching its holding, the Seventh Circuit stated, "In keeping with and in effectuation of congressional policy as to removal we hold that the basis for remanding a removed case must be grounded on federal statutory authority." 698 F.2d at 909.

The Fifth Circuit, in *In re Greyhound Lines, Inc.,* 598 F.2d 883, 884-85 (5th Cir. 1979), issued a writ of mandamus directing the district court to retain jurisdiction in a case in which the plaintiff had voluntarily dismissed the federal claim and requested and obtained a remand of the states claims.[2]

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[2]Subsequently, a panel of the Fifth Circuit, in *IMFC Professional Services, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 159-

In *Sheet Metal Workers International Association v. Seay,* 693 F.2d 1000, 1002-06 (10th Cir. 1982), *modified on other grounds on reh'g,* 696 F.2d 780 (10th Cir. 1983), the Tenth Circuit also held that remand could not be granted for a reason not expressly specified in 28 U.S.C. § 1447(c).

Thus, the Ninth Circuit's refusal to issue a writ of mandamus in this case, when remand by the district court was not authorized by 28 U.S.C. § 1447(c), directly conflicts with the decisions of the Seventh, Fifth and Tenth Circuits.

III.

The Ninth Circuit decisions allowing remand under the circumstances of this case ignore Thermtron decision and lack proper analytical support.

In denying the petition for writ of mandamus, the Ninth Circuit cited its recent decision in *Swett v. Schenk,* 792 F.2d 1447 (9th Cir. 1986), for the proposition that "once the federal claim upon which removal was based is gone, it is within the discretion of the district court to remand the state claim to the state court from which it was removed." (7a.) The *Swett* decision contains a similar statement, again without discussion of the controlling statute or this Court's *Thermtron* decision, merely citing the Ninth Circuit's pre-*Thermtron* decision in *Watkins v.*

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60 (5th Cir. 1982), held that there is discretion to decline jurisdiction over non-federal defendants once all claims against federal defendants were dismsised, finding that the case had thereby become one "removed improvidently and without jurisdiction" and thus subject to remand under 28 U.S.C. § 1447(c). However, the Fifth Circuit thereafter indicated that *In re Greyhound Lines, Inc.,* is still good law. *Boelens v. Redman Homes, Inc.,* 759 F.2d 504, 507 n.2 (5th Cir. 1985).

Grover, 508 F.2d 920 (9th Cir. 1974). The *Watkins* case had been removed from state court because two defendants were federal court officers. After removal, the case was dismissed as to the federal defendants and the district court then dismissed the remainder of the case with prejudice on the erroneous assumption that it no longer had jurisdiction to hear the state claims against the remaining defendants. The Ninth Circuit reversed the dismissal and remanded to the district court with orders to decide "whether to hear the suit on its merits or, in its discretion, to remand the suit to the state court from which it was removed." 508 F.2d at 921. The question of whether a district court *has* such discretion was not an issue before the Ninth Circuit in *Watkins* and the Ninth Circuit cited no authority for its direction that the district court decide whether, "in its discretion," to remand.

Older Ninth Circuit precedent likewise fails to provide any analytical support for that court's assertion that district courts have discretion to remand properly removed cases after dismissal of all federal claims. In *Murphy v. Kodz,* 351 F.2d 163 (9th Cir. 1965), the Ninth Circuit held that there is discretion to remand in such circumstances when there has been no substantial commitment of judicial resource, because to conclude otherwise would be "making the tail wag the dog." 351 F.2d at 168. However, all three cases cited in support of the court's conclusion were cases in which the court affirmed district court *dismissal* of the remaining non-federal claims. *Moynahan v. Pari-Mutuel Employees Guild of California, Local 280,* 317 F.2d 209, 211-12 (9th Cir. 1963); *Wham-O-Mfg. Co. v. Paradise Manufacturing Co.,* 327 F.2d 748, 753 (9th Cir. 1964); *Sunbeam Lighting Co. v. Pacific Associated Lighting Inc.,* 328 F.2d 300, 303 (9th Cir. 1964).

IV.

Like the Ninth Circuit decisions, those of other courts of appeals permitting remand to state court either fail to consider this Court's Thermtron decision or erroneously conclude that it is not controlling.

In the case of *In re Romulus Community Schools*, 729 F.2d 431 (6th Cir. 1984), the Court of Appeals for the Sixth Circuit held that the district courts have the discretion to remand state claims even if the statutory requirements of 28 U.S.C. § 1447(c) have not been met, after noting that *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), permits dismissal of state claims in certain circumstances. The Sixth Circuit apparently concluded that if the district courts have the power to dismiss the state claims under *Gibbs*, they could remand them instead. 729 F.2d at 439-40. However, *Gibbs* did not involve a removed case, and *removal jurisdiction* is based entirely upon statutes which are to be strictly construed. *Cook*, 698 F.2d at 908, citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941).

The Fourth, Eighth and Second Circuits have also held that remands may be made for reasons not set forth in 28 U.S.C. § 1447(c). In *Fox v. Custis*, 712 F.2d 84, 89-90 (4th Cir. 1983), the Fourth Circuit held that state claims should be remanded after the federal claim was voluntarily dismissed. In *Hofbauer v. Northwestern National Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir. 1983), the Eighth Circuit reached a similar conclusion, and in *Naylor v. Case and McGrath, Inc.*, 585 F.2d 557, 561-62 (2d Cir. 1978), the Second Circuit held that state claims should be remanded after voluntary dismissal of the federal claims. None of these decisions discuss this Court's *Thermtron* decision.

CONCLUSION

This Court's review of the issue in the instant case will resolve an important question of federal law concerning the authority of the district courts to remand cases properly removed from state courts after dismissal of all federal claims, reconcile a conflict among the circuits, and provide direction which will have a substantial impact on federal court litigation. For these reasons, petitioners respectfully request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

November 24, 1987

Respectfully submitted,

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APPENDIX

No. 85-7005

D.C. No.
CV-84-1982-JNK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SURVIVAL SYSTEMS OF THE WHITTAKER CORP, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

MILLIE MAE RODRIGUEZ,
Real Party in Interest.

Argued and Submitted
September 11, 1985 — San Francisco, California

Filed August 27, 1987

Before: Herbert Y. C. Choy, Procter Hug, Jr. and
Mary M. Schroeder, Circuit Judges.

Opinion by Judge Hug

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

OPINION

SUMMARY

Appeals/Jurisdiction

Petition for a writ of mandamus. Denied.

Real party in interest Rodriguez was terminated by petitioner Whittaker Corporation. Her state court suit alleged various causes of action. Petitioner removed and received summary judgment on five of the actions. Summary judgment was based on preemption by federal law. The district court held that the statute of limitations had run on these federal claims. Rodriguez argued that her sixth claim was not preempted since it was based on state law. Summary judgment was denied on this issue and remanded to state court. Petitioner requests a writ of mandamus to vacate the remand.

[1] If a remand order, ordinarily reviewable by mandamus, rests on grounds that removal was improvident and without jurisdiction, it is not reviewable at all. [2] The order of remand did not resolve the substantive issue of preemption, [3] but only the jurisdictional issue that the inartfully pled state claim failed to establish a federal claim. Therefore, the remand is not reviewable by appeal. [4] Once the federal claim upon which removal was based is gone, it is within the discretion of the district court to remand the state claim to the state court from which it was removed.

COUNSEL

Robert C. Hayden, Los Angeles, California, for the petitioner.

Virginia M. Ebert, San Diego, California, for the real party in interest.

OPINION

HUG, Circuit Judge:

Rodriguez's state court action, asserting various wrongful discharge claims and claims for intentional and negligent infliction of emotional distress, was removed on the basis of preemption under federal labor laws. The district judge granted summary judgment against Rodriguez on all claims except the claim for intentional infliction of emotional distress, which she remanded to state court. The defendants petition for writ of mandamus to compel the district court to retain jurisdiction of that claim.

We first face the procedural issues of whether the remand order is reviewable at all and, if so, whether the review should be by appeal or mandamus. We hold that the remand is not appealable, but can be reviewed as a request for a writ of mandamus. The substantive issue in the case is whether the claim for intentional infliction of emotional distress was properly remanded.

I.

FACTS

Rodriguez's suit in state court against Whittaker alleged various wrongful discharge claims, intentional infliction of emotional distress, and negligent infliction of emotional distress. Whittaker removed the case to federal court and moved for summary judgment, alleging that each cause of action was preempted by the National Labor Relations Act, and that the statute of limitations had run on these federal claims.

Rodriguez conceded that five of her claims were preempted, but argued that her claim for intentional inflic-

tion of emotional distress was not preempted, as it was based on state law. Given Rodriguez's stipulation, the district court granted summary judgment as to the other five claims.

The district court then denied the motion for summary judgment on the claim of intentional infliction of emotional distress. An emotional distress claim asserted under state law is not preempted if it is "unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Farmer v. United Bhd. of Carpenters and Joiners of America,* 430 U.S. 290, 305 (1977). The district court found that several of the facts alleged in Rodriguez's claim would support this type of state cause of action for outrageous conduct, which is not preempted, including claims that Rodriguez was held in a work area against her will by threat of physical force and was requested to commit lewd sexual acts.

The district court than remanded this emotional distress claim to state court. Whittaker requests a writ of mandamus to vacate this remand.

II.

REVIEW OF A REMAND ORDER

[1] An order remanding an action, if reviewable at all, is ordinarily reviewed by mandamus. *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 352-53 (1976). However, if a case is remanded on the ground that removal was improvident and without jurisdiction, 28 U.S.C. § 1447(c) (1982), the remand order "is not reviewable on

appeal or otherwise." 28 U.S.C. § 1447(d) (1982); *Thermtron*, 423 U.S. at 346.

Here, remand could not possibly have been based on section 1447(c); removal had not been "without jurisdiction," since five of Rodriguez's claims were held to be preempted by federal law. The statutory preclusion of review under section 1447(d) is therefore not applicable.

A question exists as to whether the order is reviewable by direct appeal, because the requested extraordinary review by mandamus is not available if review can be obtained by appeal. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 406 U.S. 1, 8 n.6 (1983). We have held that a remand order may be reviewed on appeal as a final collateral order under 28 U.S.C. § 1291 if the order resolves the merits of a matter of substantive law apart from any jurisdictional decision. *Clorox Co. v. U.S. District Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.* 741 F.2d 273, 276-78 (9th Cir. 1984).

[2] In this case, the order of remand did not resolve a matter of substantive law, as in *Pelleport* or *Clorox*. The ruling of the district court was that the state cause of action alleged in Rodriguez's complaint was not an artfully pled federal claim that was preempted by federal labor law. This did not finally resolve the issue of preemption, which could still be raised as a defense to the state claim in the state court. Thus, if the proof in state court were such as to justify the conclusion that the cause of action was completely preempted by federal labor law, the defense of preemption could be sustained. The ruling of the district court was simply that the allegations of the complaint did not justify such a result.

[3] Thus, the only issue decided by the remand order is the jurisdictional issue, that the claim of intentional infliction of emotional distress was a state claim and not an artfully pled federal claim. This district judge then exercised her discretion in remanding that state claim. Therefore, the remand is not reviewable on appeal as a substantive decision under the doctrine of *Pelleport* and *Clorox*. The only avenue of review available is by mandamus under the authority of *Thermtron*.

III.

ISSUANCE OF A WRIT OF MANDAMUS

The issuance of a writ of mandamus is an extraordinary remedy available to the courts of appeal under 28 U.S.C. § 1651 (1982). *Will v. United States*, 389 U.S. 90, 95 (1967). In *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977), we set forth guidelines for when the issuance of a writ of mandamus is appropriate. Although several indicators are specified for consideration in *Bauman*, one factor is determinative in this case. When the district court's order is correct as a matter of law, it is obvious that the writ of mandamus should not be issued.[1]

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[1]The guidelines enumerated in *Bauman* are (1) the party seeking the writ has no other adequate means to obtain the desired relief, such as a direct appeal; (2) The petitioner will be prejudiced or damaged in a manner not correctable on appeal; (3) The district court's order is clearly erroneous as a matter of law; (4) The district court's order represents an error often made, or is indicative of a persistent disregard of the federal rules; and (5) The district court's order involves new and important issues, generally of first impression. All of these guidelines need not be met and they may not all be applicable in any one case. *Bauman*, 557 F.2d at 655. With regard to the first two factors, we have noted that Rodriguez [sic] has no other avenue of review in federal court; however, the issue of preemption remains open for determination and review in state court. The third

The Supreme court' holding in *Farmer v. Carpenters,* 430 U.S. at 305, that a state claim for infliction of emotional distress is not preempted if it was the result of particularly abusive conduct, provides a sound basis for the district court's conclusion that the complaint alleged a non-preempted state claim. The allegations of the complaint, if proved, could sustain a finding that the conduct was outrageous, and thus the claim was not preempted. The district judge's holding was correct that a non-preempted state claim was alleged.

[4] While a federal court has jurisdiction to retain and decide a state claim that is not independently removable, once the federal claim upon which removal was based is gone, it is within the discretion of the district court to remand the state claim to the state court from which it was removed. *Swett v. Schenk,* 792 F.2d 1447, 1450 (9th Cir. 1986).[2]

The petition for a writ of mandamus is denied.

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factor is determinative. It is apparent that if the district court's legal conclusion is correct, the fourth and fifth enumerated factors become irrelevant.

[2]We recognize that the circuits are not in agreement as to the availability of remand for pendent claims, and that the Supreme Court has granted certiorari on this issue. *Carnegie-Mellon Univ., et al. v. Cohill,* 107 S. Ct. 1283 (1987). The relevant test, however, is whether the district court court's [sic] order was clearly erroneous as a matter of law. Given the Ninth Circuit authority allowing remand under the circumstances of this case, the remand order was obviously not clearly erroneous.

No. 85-7005
DC# CV-84-1982 JNK
Southern California
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
SURVIVAL SYSTEMS DIVISION OF THE
WHITTAKER CORPORATION, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
Respondent,
and
MILLIE MAE RODRIGUEZ,
Real Party in Interest.

ORDER

Filed April 1, 1985

Before: WALLACE, FLETCHER, and WIGGINS, Circuit Judges

The petition presents the question whether the district court erred by refusing to treat the remanded claims as artfully pleaded § 301 claims. *See Hunter v. United Van Lines,* 746 F.2d 635, 642-43 (9th Cir. 1984). *See also Aragon v. Federated Department Stores, Inc.,* 750 F.2d 1447 (9th Cir. 1985). Another question is whether review is available under the collateral order doctrine, thus precluding mandamus review. *See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273, 276 (9th Cir. 1984).

Answers to these two questions shall be filed, according to the provisions of Fed. R. App. P. 21(b), within 28 days of the entry of this order. Petitioners may file a reply

within 14 days of service of any answers. Upon receipt of the answers and reply, this case will be submitted to a merits panel with *Paige v. Henry J. Kaiser Co.*, No. 84-2246, and *Henry J. Kaiser Co. v. United States District Court*, No. 84-7866, which present a similar issue.

Civil No. 84-1982-K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MILLIE MAE RODRIGUEZ,
Plaintiff,
vs.
WHITTAKER CORPORATION, et al.,
Defendants.

ORDER

Filed date illegible

The motion of Defendants WHITTAKER CORPORATION (Petitioners herein) for Summary Judgment having come before this court on October 9, 1984, and the issues having been heard and considered,

IT IS ORDERED,

1. The motion for Summary Judgment as to the First, Second, Third, Fourth and Sixth Causes of Action in the Plaintiff's complaint are granted.

2. The motion for Summary Judgment as to the Fifth Cause of Action is denied.

3. The Fifth Cause of Action and the Cross-Complaint are remanded to the State Court, pursuant to this court's sound discretion under 28 U.S.C. § 1447. *See, Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062 (9th Cir. 1979);

Three J Farms, Inc. v. Alton Box Board Co., 609 F.2d 112, 114 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

Dated: 12/4/84

JUDITH N. KEEP

Judith N. Keep, Judge
United States District Court

Copies to:

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 24, 1987, I served the within Petition for a Writ of Certiorari in re: "Survival Systems vs. Millie Mae Rodriguez" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Law Offices of Virginia M. Ebert
Virginia M. Ebert, Esq.
3991 Ohio Street
San Diego, California 92104

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 24, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

BEST AVAILABLE COPY